

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

3: i2

UNITED STATES OF AMERICA)
)
Plaintiff,)
)
v.)
)
DEGUSSA INITIATORS, LLC)
)
Defendant.)
_____)

Civil Action No.

1:05CV1915

JUDGE O'MALLEY

CONSENT DECREE

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Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a Complaint in this action concurrently with this Consent Decree alleging that Defendant Degussa Initiators, LLC. violated Sections 307(d) and 308 of the Clean Water Act (-Act"), 33 U.S.C. §§ 1317(d) and 1318.

The Complaint alleges, pursuant to Sections 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d). that Defendant violated several pretreatment standards at its organic peroxide manufacturing facility in Elyria, Ohio (the "Facility"). Specifically, the Complaint alleges Defendant failed to comply with: (a) daily and monthly effluent limitations for certain pollutants under the Organic Chemicals, Plastics, and Synthetic Fibers ("OCPSF") categorical pretreatment standards, codified at 40 C.F.R. Part 414; (b) daily and monthly effluent limitations for certain pollutants under its Industrial User permit ("IU Permit") issued pursuant to the Act by the Elyria Publicly Owned Treatment Works("POTW"); (c) monitoring and reporting requirements under 40 C.F.R. § 403.12(g); and (d) monitoring and reporting requirements under a March 20, 2001 EPA information request issued pursuant to section 308 of the Act, 33 U.S.C. § 1318.

The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I below, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the Act, 33 U.S.C. § 1319(b), and over the Parties. Venue lies in this District pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b); 28 U.S.C. §§ 1391 (b) and (c) and 1395(a), because the violations alleged in the Complaint are alleged to have occurred in, and Defendant conducts business in, this judicial district. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree or such action and over Defendant, and consents to venue in this judicial district.

2. For purposes of this Consent Decree only, Defendant agrees that the Complaint states claims upon which relief may be granted pursuant to Sections 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d).

3. Notice of the commencement of this action has been given to the State of Ohio as required by 33 U.S.C. § 1319(b).

II. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon the United States; and upon Defendant, its agents, successors, and assigns.

5. Any transfer of ownership or operation of the Facility to any other person must be conditioned upon the transferee's agreement to undertake the obligations required by this Decree, as provided in a written agreement between Defendant and the proposed transferee, enforceable by the United States as third-party beneficiary of such agreement. At least 30 days prior to such transfer, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of

the proposed written agreement, to EPA Region 5, the United States Attorney for the Northern District of Ohio, and the United States Department of Justice, in accordance with Section XIV of this Decree (Notices). No transfer of ownership or operation of the Facility, whether in compliance with this Paragraph or otherwise, shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented.

6. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

8. This Consent Decree incorporates the definitions in the Act and the regulations promulgated pursuant to the Act, unless otherwise specified. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "Act" means the Federal Water Pollution Control Act, as amended.

33 U.S.C. § 1251 et seq. also known as the Clean Water Act.

b. "Complaint" means the complaint filed by the United States in this action;

c. "Consent Decree" or "Decree" shall mean this Decree;

d. "Day" shall mean a calendar day; unless expressly stated to be a working day.

In computing any period of time under this Consent Decree, where the last day would fall on a

Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;

e. "Defendant" shall mean Degussa Initiators, LLC.

f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

g. "Facility" shall mean Defendant's organic peroxide manufacturing facility located in Elyria, Ohio.

h. "IU Permit" means Defendant's wastewater discharge permit for the Facility issued by the City of Elyria, Ohio pursuant to the Act, as well as any other permit amendment or renewal or new permit issued for the Facility under the Act.

i. "Paragraph" shall mean a portion of this Decree identified by an arabic numeral;

j. "Parties" shall mean the United States and Defendant;

k. "Section" shall mean a portion of this Decree identified by a roman numeral;

l. "State" shall mean the State of Ohio.

m. "United States" shall mean the United States of America, acting on behalf of EPA;

IV. CIVIL PENALTY

9. Within 30 days after the Effective Date of this Consent Decree, Defendant shall pay a civil penalty of \$ 345,203.50. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice according to instructions provided to Defendant following lodging of the Consent Decree by the Financial Litigation Unit of the U.S. Attorney's Office for the Northern District of Ohio. At the time of payment, Defendant shall simultaneously

send written notice of payment and a copy of any transmittal documentation to the United States in accordance with Section XIV of this Decree (Notices).

10. Defendant shall not deduct the civil penalty paid under this Section in calculating its federal income tax.

V. COMPLIANCE REQUIREMENTS

11. Defendant certifies that, as of the date of Defendant's execution of this Consent Decree, it has implemented corrective measures as necessary to ensure the Facility's consistent compliance with: (a) all effluent limitations specified under 40 C.F.R. §§ 414.85 and 414.111 and its IU Permit; and (b) monitoring and reporting requirements required under 40 C.F.R. § 403.12(g), its IU Permit, and the March 20, 2001 EPA information request issued pursuant to section 308 of the Act, 33 U.S.C. § 1318. Defendant shall implement additional corrective measures (which may include construction of additional wastewater treatment and control systems) as necessary to ensure Defendant's continued compliance with all effluent limitations and monitoring and reporting requirements specified in this paragraph, or in an applicable pretreatment standard promulgated under the Act.

12. Defendant shall comply with all effluent limitations specified under 40 C.F.R. §§ 414.85 and 414.111. and its IU Permit.

13. Defendant shall conduct monitoring and reporting in accordance with 40 C.F.R. § 403.12(g). and its IU permit.

14. Until termination of this Consent Decree, Defendant shall conduct monthly sampling and analysis of all discharges subject to pretreatment standards, and shall collect and submit the data to EPA in quarterly reports, in the manner described in Paragraphs 7 and 10 of EPA's Section 308 information request. Docket No. V-W-01-308-07, dated March 20, 2001, a copy

which is attached hereto as Appendix A. Defendant shall submit to EPA copies of all self-monitoring reports and the periodic compliance reports required under 40 C.F.R. Part 403.12(h) at the same time that they are submitted to the City of Elyria. These data must be independent of the data gathered by the City of Elyria. Sampling and analysis shall be performed in accordance with 40 C.F.R. Part 136, unless an alternative procedure or method is approved by the Regional Administrator for EPA Region 5 or his or her delegate. Unless EPA specifies another person or address by written notice to Defendant, the Defendant shall submit the reports required by this paragraph to:

Chief, Water Enforcement and Compliance
 Assurance Branch (WC 15J)
 U.S. Environmental Protection Agency, Region 5
 77 W. Jackson Blvd.
 Chicago, Illinois 60604

Each report shall have a signed certification as described in Paragraph 27 of this Consent Decree. Upon termination of this Consent Decree, the reporting requirements of EPA's Section 308 information request, Docket No. V-W-01-308-07, dated March 20, 2001, shall terminate.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECT

15. Floating Roof for Equalization Basin.

a. Defendant shall install and maintain a floating roof for the Elyria Plant's wastewater treatment plant equalization and retention tank (T-40). The roof shall be designed to reduce the release of odors from wastewater in the tank to the atmosphere. In addition, the tank contents shall be mixed with subsurface eductors to reduce the amount of disturbance on the wastewater surface, thus reducing the volatility of such wastewater.

b. This project shall be completed within 60 days of entry of this Decree.

c. In implementing this project, Defendant shall spend not less than 527,514 in capital

costs.

16. Defendant is responsible for the satisfactory completion of the project in accordance with the requirements of this Decree. Defendant may use contractors and/or consultants in planning and implementing the project.

17. With regard to the project, Defendant certifies the truth and accuracy of each of the following:

- a. That all cost information provided to EPA in connection with EPA's approval of the project is complete and accurate and represents a fair estimate of the costs necessary to implement the project;
- b. That, as of the date of this Decree, Defendant is not required to perform or develop the project by any federal, state, or local law or regulation, nor is Defendant required to perform or develop the project by agreement, grant, or as injunctive relief awarded in any other action in any forum;
- c. That Defendant has not received, and is not negotiating to receive, credit for the project in any other enforcement action; and
- d. That Defendant will not receive any reimbursement for any portion of the project from any other person.

18. SEP Completion Report. No later than 120 days after the entry of this Decree, Defendant shall submit a SEP Completion Report to the EPA, in accordance with Section XIV of this Consent Decree (Notices). The SEP Completion Report shall contain the following information:

- a. A detailed description of the SEP as implemented;
- b. A description of any problems encountered in completing the SEP and the solutions thereto;
- c. An itemized list of all eligible SEP costs, and documents evidencing such costs, including, but not limited to, invoices, purchase orders, cancelled checks, or other documentation that specifically identifies and itemizes the individual costs of the goods or services for which payment was made;

- d. Certification that the SEP has been fully implemented pursuant to the provisions of this Decree; and
- e. A description of the environmental and public health benefits resulting from implementation of the SEP (with a quantification of the benefits and pollutant reductions, if feasible).

19. EPA may, in its reasonable discretion, require information in addition to that described in the preceding Paragraph to determine the adequacy of SEP completion or eligibility of SEP costs.

20. After receiving the SEP Completion Report, the United States shall notify Defendant whether or not Defendant has satisfactorily completed the SEP. If the SEP has not been satisfactorily completed in accordance with the schedule under Paragraph 15, above, or if the amount expended on performance of the SEP is less than the amount set forth in Paragraph 15, above, Stipulated Penalties may be assessed under Section VIII of this Decree (Stipulated Penalties).

21. Disputes concerning whether Defendant has satisfactorily performed the SEP and the amount of eligible SEP costs may be resolved under Section X of this Decree (Dispute Resolution).

22. Each submission required under this Section shall be signed by an official of the Defendant who has knowledge of the SEP and shall bear the certification language set forth in Paragraph 27, below.

23. Any public statement, oral or written, in print, film, or other media, made by Defendant making reference to the SEP under this Decree shall include the following language, "This project was undertaken in connection with the settlement of an enforcement action, United States v. Degussa Initiators, LLC, taken on behalf of the U.S. Environmental Protection Agency

under the Clean Water Act."

VII. REPORTING REQUIREMENTS

24. Defendant shall notify the United States of the violation of any requirement of this Consent Decree and its likely duration in writing within ten working days of the day Defendant first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, and/or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendant shall include a statement to that effect in the report. Defendant shall investigate to determine the cause of the violation, including a full explanation of the cause of the violation, within 30 days of the day Defendant became aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the requisite notice for purposes of Section IX (Force Majeure).

25. In the case of any violation or other event that may pose an immediate threat to the public health, welfare, or the environment. Defendant shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but not later than 24 hours after Defendant first knew of, or should have known of the violation or event. The notification shall be made to:

Chief, Water Enforcement and Compliance
Assurance Branch (WC 15J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard

Chicago, Illinois 60604

This procedure is in addition to the requirements set forth in the preceding Paragraph.

26. Unless otherwise specified in this Consent Decree, all reports shall be submitted to all the persons designated in Section XIV of this Consent Decree (Notices).

27. Each report submitted by Defendant under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing and willful submission of a materially false statement.

28. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

29. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VIII. STIPULATED PENALTIES

30. If Defendant fails to pay the civil penalty required under Section IV of this Decree (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$ 2,000 per day for each day that the payment is late. Late payment of the civil penalty shall be made according to Section IV, Paragraph 9. above. Stipulated Penalties shall be paid according to Section VIII Paragraph 36. below. All transmittal correspondence shall state that any such payment is for late payment of the civil penalty due under this Decree, or for Stipulated Penalties for late payment, as applicable, and shall include the identifying information set forth in Paragraph 9, above.

31. Defendant shall be liable for Stipulated Penalties to the United States for violations of this Consent Decree which occur after the date of lodging of this Consent Decree as specified below, unless excused under Section IX (Force Majeure).

a. Effluent Limitations. For any failure to comply with an effluent limitation specified by 40C.F.R. §§414.85 and 414.111, or the IU Permit:

(1) For a violation of a daily limit for a particular effluent limitation:

(A) For each violation of a particular effluent limitation:

- (i) \$2,000 per violation for the first ten violations;
- (ii) \$3,500 per violation for the 11th through 20th violation;
- (iii) \$4,000 per violation for the 21st and each subsequent violation;

(B) In addition to the penalties specified in paragraph 31(a)(1)(A) above:

- (i) \$1,500 for each violation which exceeds the daily limit by 100% to 200%;
- (ii) \$3,000 for each violation of the daily limit which exceeds the limit over 200% to 500%;
- (iii) \$7,500 for each violation of the daily limit which exceeds the limit over 500%.

(2) Violation of monthly limit for a particular pollutant:

- (A) \$1,000 for the first violation;
- (B) \$2,500 for the second violation;
- (C) \$7,500 for the third violation and each subsequent violation.

(3) If Defendant violates both daily and monthly limits for the same pollutant in the same month. Defendant shall be liable for stipulated penalties for violations of both the daily and monthly limits in accordance with this Consent Decree.

b. Monitoring and Reporting.

(1) For failure to conduct adequate pollutant monitoring and sampling data collection or analysis required by this Consent Decree for any pollutant parameter for a given month:

(A) \$2,000 for the first violation:

(B) \$3,500 for the second violation;

(C) \$4,000 per violation for the third and each subsequent violation.

(2) For failure to submit a monitoring report required under Paragraph 14 of this Consent Decree by the due date specified:

(A) \$1,000 per day for the first through 15th day the report is late;

(B) \$2,000 per day for the 16th through 30th day the report is late:

(C) \$3,000 per day for the 31st day the report is late and thereafter.

c. SEP Compliance.

(1) Except as provided in subparagraph (2) below, if Defendant does not complete the SEP satisfactorily in accordance with this Consent Decree, Defendant must pay a stipulated penalty of \$33,000.

(2) If Defendant did not complete the SEP satisfactorily, or completed the SEP satisfactorily but did not expend \$27,514, and EPA determines that Defendant: (A) made good faith and timely efforts to complete the SEP; and (B) certified, with supporting documentation, that it spent at least 90 percent of the required amount on the SEP, Defendant will not be liable for any additional stipulated penalty.

(3) If Defendant satisfactorily completed the SEP required by this Consent Decree, but spent less than 90 percent of \$27,514, Defendant must pay a stipulated penalty reflecting the difference between \$27,514 and the amount actually expended.

(4) If Defendant fails to submit the SEP Completion Report by the date specified under Paragraph 18 of this Consent Decree, Defendant must pay a stipulated penalty of \$1,000 each day after the report was due until it submits the report. If the SEP Completion Report is more than 30 days late, EPA, in its unreviewable discretion, may deem the SEP not satisfactorily completed and may impose a total penalty of \$33,000.

D. Reporting Requirements. The following Stipulated Penalties shall accrue per violation per day for each violation of the reporting requirements of Section VII of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1 st through 14th day
\$2,000	15th through 30th day
\$3,000	31 st day and beyond

32. Stipulated Penalties under this Section shall begin to accrue on the day a violation occurs and shall continue to accrue until the violation ceases. Stipulated Penalties shall accrue simultaneously for separate violations of this Consent Decree. Defendant shall pay any Stipulated Penalty within 30 days of receiving the United States' written demand.

33. The United States may, in the unreviewable exercise of its discretion, reduce or waive Stipulated Penalties otherwise due it under this Consent Decree.

34. Stipulated Penalties shall continue to accrue as provided in Paragraph 32, above, during any Dispute Resolution, with interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

- (a) If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, with interest, to the United States within 30 days of the effective date of the agreement or the receipt of EPA's decision or order;
- (b) If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 days of receiving the Court's decision or order, except as provided in Subparagraph c. below;
- (c) If any Party appeals the District Court's decision, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within 15 days of receiving the final appellate court decision.

35. Defendant shall pay Stipulated Penalties accruing between the date of lodging and the Effective Date of this Consent Decree within 30 days of the Effective Date of this Decree.

36. Defendant shall, as directed by the United States, pay Stipulated Penalties owing to the United States by certified or cashier's check in the amount due payable to the "U.S. Department of Justice," referencing DOJ No. 90-5-1-1-07956 and United States Attorney's Office file number 2003V00282, and delivered to the office of the United States Attorney, Northern District of Ohio, United States Courthouse, 801 West Superior Avenue, Suite 400, Cleveland, Ohio 44113.

37. Defendant shall not deduct Stipulated Penalties paid under this Section in calculating its federal income tax.

38. If Defendant fails to pay Stipulated Penalties according to the terms of this Consent Decree, the United States shall be entitled to collect interest on such penalties, as provided for in 28U.S.C. § 1961.

39. Subject to the provisions of Section XII of this Consent Decree (Effect of Settlement/Reservation of Rights), the Stipulated Penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Defendant's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of the Act, Defendant shall be allowed a credit, for any Stipulated Penalties paid, against any statutory penalties imposed by the United States for such violation.

40. Any payment of or liability for penalties to the State of Ohio or the City of Elyria POTW for pretreatment standard violations can not be used as a credit against any stipulated penalties imposed by this Consent Decree.

IX. FORCE MAJEURE

41. A "force majeure event" is any event beyond the control of Defendant, its contractors, or any entity controlled by Defendant that delays the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. "Best efforts" includes anticipating any potential force majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

42. Defendant shall notify the United States orally or by electronic or facsimile transmission as soon as possible, but not later than 72 hours after the time Defendant first knew of, or by the exercise of reasonable diligence under the circumstances, should have known of, a claimed force majeure event. Defendant shall make the notification to:

Chief, Water Enforcement and Compliance
Assurance Branch (WC 15J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard

Chicago, Illinois 60604

Defendant shall also notify the United States in writing, as provided in Section XIV of this Consent Decree (Notices), within seven days of the time Defendant first knew of, or by the exercise of due diligence, should have known of, the event. The notice shall state the anticipated duration of any delay; its cause(s); Defendant's past and proposed actions to prevent or minimize any delay; a schedule for carrying out those actions; and Defendant's rationale for attributing any delay to a force majeure event. Failure to give such notice shall preclude Defendant from asserting any claim of force majeure.

43. If the United States agrees that a force majeure event has occurred, the United States may agree to extend the time for Defendant to perform the affected requirements for the time necessary to complete those obligations. An extension of time to perform the obligations affected by a force majeure event shall not, by itself, extend the time to perform any other obligation. Where the United States agrees to an extension of time, the appropriate modification, if necessary, shall be made pursuant to Section XVIII of this Consent Decree (Modification).

44. If the United States does not agree that a force majeure event has occurred, or does not agree to the extension of time sought by Defendant, the United States' position shall be binding, unless Defendant invokes Dispute Resolution under Section X of this Consent Decree. In any such dispute, Defendant bears the burden of proving, by a preponderance of the evidence, that each claimed force majeure event is a force majeure event; that Defendant gave the notice required by Paragraph 42; that the force majeure event caused any delay Defendant claims was attributable to that event; and that Defendant exercised best efforts to prevent or minimize any delay caused by the event.

X. DISPUTE RESOLUTION

45. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the United States to enforce obligations of the Defendant that have not been disputed in accordance with this Section.

46. Informal Dispute Resolution. Any dispute subject to dispute resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen on the date when Defendant sends the United States a written Notice of

Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be binding unless, within 30 days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

47. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but may not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

48. The United States shall serve its Statement of Position within 30 days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, at a minimum, any factual data, analysis, or opinion supporting that position and supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

49. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIV of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 30 days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the

relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

50. The United States shall respond to Defendant's motion within the time period provided in the Local Rules of this Court, unless the parties stipulate otherwise. Defendant may file a reply memorandum, to the extent permitted by the Local Rules or the Parties' stipulation, as applicable.

51. In any dispute under this Paragraph, Defendant shall bear the burden of demonstrating that its position is not inconsistent with this Consent Decree and the Act. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious or otherwise not in accordance with law.

52. The invocation of dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree not directly in dispute. Stipulated Penalties with respect to the disputed matter, if any, shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 34, above. If Defendant does not prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

XI. INFORMATION COLLECTION AND RETENTION

53. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry to the Facility, at all reasonable times, upon presentation of credentials to:

- a. Monitor the progress of activities required under this Consent Decree;

- b. Verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. Obtain samples and, upon request, splits of any samples taken by Defendant or its representative, contractors, or consultants;
- d. Obtain documentary evidence, including photographs and similar data; and
- e. Assess Defendant's compliance with this Consent Decree.

54. Upon request, Defendant shall provide EPA or its authorized representatives splits of any samples taken by Defendant. Upon request, EPA shall provide Defendant splits of any samples taken by EPA or its authorized representatives.

55. Until three years after the termination of this Consent Decree, Defendant shall retain, and shall instruct its contractors and agents to preserve, the original or at least one legible copy of all records and documents (including records or documents in electronic form) in its or its contractors' or agents' possession or control, that relate in any manner to Defendant's performance of its obligations under this Consent Decree. This record retention requirement shall apply regardless of any corporate or institutional document-retention policy to the contrary. At any time during this record-retention period, the United States may request copies of any documents or records required to be maintained under this Paragraph.

56. Defendant may assert that certain documents, records, or other information requested by the United States pursuant to the above paragraph is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a brief description of the subject of the document, record, or information; and (6) the privilege asserted

by Defendant. However, Defendant shall not withhold any documents, reports, or other information created or generated pursuant to the requirements of this Consent Decree on the grounds that they are privileged.

57. This Consent Decree does not limit or affect any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal or state laws, regulations, or permits.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

58. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging.

59. This Consent Decree shall not be construed to prevent or limit the rights of the United States to obtain penalties or injunctive relief under the Act, or under other federal or state laws, regulations, or permit conditions, except as expressly specified herein.

60. Except as provided in Paragraph 58 of this Consent Decree, compliance with this Decree shall not in itself be a defense to any action commenced pursuant to or for violation of applicable federal, state or local law. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act.

61. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

62. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

63. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health, welfare, or the environment arising at, or posed by Defendant's Facility, whether related to the violations addressed in this Consent Decree or otherwise.

XIII. COSTS

64. The Parties shall bear their own costs of this action, including attorneys fees, except that the United States shall be entitled to collect the costs (including attorneys fees) incurred in any action necessary to collect any portion of the civil penalty due under Section IV or any Stipulated Penalties for which payment was due pursuant to Section VIII of this Consent Decree.

XIV. NOTICES

65. Unless otherwise specified herein, whenever this Decree requires notifications, submissions, or communications, they shall be in writing and addressed as follows:

To the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, D.C. 20044-7611
Re: DOJ No. 90-5-1-1-07956

and

Steven J. Paffilas (0037376)
Assistant U.S. Attorney
Carl B. Stokes U.S. Courthouse
801 West Superior #400
Cleveland, Ohio 44113

To EPA:

Mark J. Palermo, Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

and

Chief, Water Enforcement and Compliance
Assurance Branch (WC-15J)
U.S. Environmental Protection Agency
Region 5
77 W. Jackson Blvd.
Chicago, IL 60604

To Degussa Initiators, LLC:

Kevin E. Mann, Senior Counsel
Legal Sendee Center
Degussa Corporation
23700 Chagrin Boulevard
Beachwood, Ohio 44122

and

Mike Barreca
Plant Manager
Degussa Initiators, LLC
555 Garden Street
Elyria, Ohio 44035

66. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

XV. EFFECTIVE DATE

67. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XVI. RETENTION OF JURISDICTION

68. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections X and XVII, or effectuating or enforcing compliance with the terms of this Decree.

XVII. MODIFICATION

69. This Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court.

XVIII. TERMINATION

70. After one year following the entry of this Consent Decree, Defendant may make a written request to the United States and EPA to terminate this Consent Decree. If EPA determines that (a) Defendant has paid all penalties, stipulated penalties, interest, and any other monetary obligations due hereunder, (b) no unresolved matters subject to dispute resolution pursuant to Section X exist, (c) Defendant is, and for a least the past year has been in compliance with the requirements described in Section V, and (d) Defendant has fully performed the requirements in Section VI, then the Parties shall jointly file with the Court an appropriate motion reciting that the requirements of the Consent Decree have been met and asking the Court to terminate the Consent Decree. If EPA does not agree that these obligations have been met then the United States shall provide Defendant with written notification reflecting EPA's

determination that the Consent Decree shall not be terminated and the reasons supporting EPA's determination. If Defendant disputes EPA's determination, the dispute shall be resolved in accordance with Section XI (Dispute Resolution) of this Consent Decree.

XIX. PUBLIC PARTICIPATION

71. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice.

XX. SIGNATORIES/SERVICE

72. Each undersigned representative of Defendant, the Acting Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice, and the United States Attorney certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

73. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect.

74. Defendant agrees not to oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

75. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set

forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXI. INTEGRATION

76. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XXII. FINAL JUDGMENT

77. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and Defendant.

SO ORDERED THIS __ DAY OF _____.

United States District Judge

Signature Page for Consent Decree in:

United States of America

v.

Degussa Initiators, LLC.

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RICA

Date: _____

W. BENJAMIN FISHEROW
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

Date: 7/1/05

MIRIAM L. CHESSLIN
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202)514-1491

GREGORY A. WHITE
United States Attorney for the
Northern District of Ohio

Date: kfokr By: _____

Steven J. Paffilas(0037376)
Assistant U.S. Attorney
Carl B. Stokes U.S. Courthouse
801 West Superior. #400
Cleveland, OH 44113
Voice: 216-622-3698
Fax:216-522-4982
Steven.Paffilas@usdoj.gov

Signature Page for Consent Decree in:

United States of America

v.

Degussa Initiators, LLC

Date:

6/27/05

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BHARAT MATHUR

Acting Regional Administrator

U.S. Environmental Protection Agency, Region 5

77 W. Jackson Boulevard

Chicago, IL 60604

June 22, 2005


BERTRAM C. FREY

Acting Regional Counsel

U.S. Environmental Protection Agency, Region 5

77 W. Jackson Boulevard

Chicago, IL 60604

21 June 2005


MARK J. PALERMO

Associate Regional Counsel

U.S. Environmental Protection Agency, Region 5

77 W. Jackson Boulevard

Chicago, IL 60604

Signature Page for Consent Decree in:

United States of America

v.

Degussa Initiators, LLC

FOR DEGUSSA INITIATORS, LLC

Date:

15 JUNE 2005

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Typed Name: Ted M. Pettijohn_____

Title: Vice President and General Manager

Address: Degussa Initiators, Inc.
Waterway Plaza One, Suite 975
10003 Woodloch Forest Drive
The Woodlands, Texas 77380